

HUMAN SERVICES BOARD

In re) Fair Hearing No. R-10/09-571
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 Appeal of)

The petitioner appeals the decision by the Department for Children and Families, Child Development Division Licensing Unit citing her day care facility for a violation of its regulations following an inspection of the petitioner's day care on August 19, 2009. The issues are whether the petitioner failed to report a child's injury at her day care and, if so, whether that failure constituted a violation of the Department's health and safety regulations.

The following findings of fact and conclusions of law are based on the testimony taken at the hearing in the matter, held on January 28, 2010, and on the written arguments filed by the parties after that hearing.

1. On the morning of August 12, 2009 a child at the petitioner's day care slipped while playing on the day care's jungle gym. Staff at the day care did not witness the accident, but they promptly responded to the girl's crying

and did not find any indication that she was seriously injured.

2. At lunch time, another staff member noticed a bump on the child's head. Although the child seemed fine, the staff member filled out an injury report to give to the child's mother.

3. The child's mother picked her daughter up at about 1 p.m. that day. Staff gave the mother the injury report, and the girl told her mother that she had bumped her head while playing on the jungle gym.

4. Later that afternoon, the mother noticed that in addition to the small lump on her forehead, the child had developed a bruise mark on her cheek and a swollen nose.

5. The mother then called the assistant director of the day care and left a phone message inquiring about the details of accident. At about 4:30 p.m. the assistant director called the mother and explained that the staff had not witnessed the accident when it happened.

6. After speaking with the assistant director, the mother called the child's doctor, who recommended that the child be seen at the emergency room. The mother then took the child to the emergency room, where it was determined that she had not suffered any serious injury.

7. The details of what happened next are the subject of considerable dispute. The child's mother testified at the hearing that she called the assistant director the next day, August 13, 2009, and told her that she was keeping the child home because of the "swelling". The mother further testified that she told the assistant director that she had taken the child to the emergency room and that the child was OK.

8. The assistant director testified that she had no further conversation with the parent after her phone call on August 12. She testified that she did not learn that the mother had taken the child to the emergency room until she was later informed of it by the Department's licensur.

9. The petitioner testified that she spoke by phone with the mother on August 14, 2009, two days after the accident, after the mother had left a phone message for her. (The mother had testified that she recalled this conversation taking place several days after the accident.) The petitioner further testified that the mother seemed "confused" about the accident, and said she was "pulling" her daughter from the day care. The petitioner recalled that the mother told her that the "doctor says she could have had a bloody nose", but she did not recall that the mother had

mentioned taking the child to the emergency room. She stated that she also did not learn of the emergency room visit until being told of it by the Department on August 19.

10. Both the petitioner (Sue) and the assistant director (Sandy) testified that the mother often seemed mixed up about their identities when she communicated with them.

11. The problem for the Board is that all the witnesses were entirely credible. Neither the mother, the petitioner, nor the assistant director appeared motivated by either self-interest or ill will. The only credible explanation for the conflicting testimony is that one or more of the witnesses is simply, but understandably, mistaken in their memory of the timing and details of their conversations with each other at that time.

12. Based on the witnesses' testimony, it is found that if the mother called the day care on August 13, 2009, the day after her daughter's accident, it was only to report that her daughter would not be attending that day.

13. However, it is found that the mother did discuss the accident with the petitioner in more detail on August 14, 2009. As noted above, the petitioner did recall that the mother mentioned at that time that she had spoken with the child's doctor.

14. Based on the foregoing, the hearing officer deems it highly unlikely that the mother would have failed to mention to the petitioner on August 14, 2009 that the child had been seen by a doctor. It is further found, however, that given the facts that the conversation that day centered on the mother removing her child from the petitioner's day care, and that the child's injuries were not serious, the petitioner might well have not noted and remembered this detail.

15. The above notwithstanding, it cannot be found that the petitioner knowingly or willfully failed to report the child's accident to the Department.

16. There is no dispute that after removing her child from the petitioner's day care the mother reported the incident to the Department, which visited the day care on August 19, 2009, leading to the citation that is the subject of this appeal.

RECOMMENDATION

The Department's decision should be affirmed.

REASONS

At the outset, it must be noted that this case does not involve a decision by the Department regarding the petitioner's day care license. It is only whether the incident noted in the Department's inspection of the petitioner's facility on August 19, 2009 occurred and, if so, whether it constituted a "violation" of the Department's day care regulations. If it did, a notice of that violation is listed on the Department's web site for the public's information.

Regulation IIIC19 of the Department's regulations provides:

The child's parent and the Division shall receive a written report within two working days of an accident or injury that required the services of a medical professional, including a dentist, which occurred while the child was in attendance.

The petitioner's main argument is that she was unaware until being informed by the Department a week later that the child had ever received medical attention for her injury on August 12, 2009. As noted above, however, it is found that the child's parent did report this fact to the petitioner, but that the petitioner, understandably and without lacking good faith, failed to note and report it.

It may be arguable whether such a "reporting" violation can be said to have occurred in such circumstances. However,

inasmuch as there is nothing in the regulation itself requiring a showing of lack of good faith, it cannot be concluded that this alone necessarily excuses or exempts a licensee from compliance with the above regulation.¹

The petitioner argues in the alternative that a child simply being seen by a doctor, but not receiving actual medical treatment, does not amount to "an accident or injury that required the services of a medical professional". However, it must be concluded that the word "services" in the above regulation includes any medical examination, whether or not that examination leads to further treatment. There is certainly no evidence or allegation in this matter that the child's mother was unreasonable or unduly alarmist in seeking medical attention for her daughter. It cannot reasonably be concluded that an emergency room examination of a child done on the advice of the child's doctor does not amount to

¹ This begs the question, however, of whether the Department has the *discretion* under the regulations to *consider* questions of good faith in determining whether to cite a facility for such a violation. Given the findings in this matter, the petitioner is free to seek further redress from the Department on this issue.

"required. . .services" of a medical professional within the meaning and intent of the above regulation.

Given that the sole purpose of the Department's regulations is to protect the health and safety of children, and that the mere posting of violations in day cares on the internet is intended to be informational, rather than punitive, the Board has consistently granted the Department deference and leeway in its interpretation of what constitutes a violation of its regulations.² Therefore, it cannot be concluded in this case that the Department is acting beyond its discretion to publicize, as a guide to *all* parents, that the petitioner's day care, on at least one occasion, was found to have not strictly complied with a reasonable health and safety requirement, even when the violation is found to have been unknowing and unintentional.

Inasmuch as the Department's decision in this case is supported by the evidence and constitutes a reasonable

² The Board again notes, however, that the Department could probably avoid many appeals in these matters if its web site specified more details regarding cited "violations".

interpretation of its own regulations, it must be affirmed by the Board. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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